California Workfare Legislation and the Right of Privacy

Introduction

In 1985, the California Legislature passed a law authorizing the first statewide workfare program,[1] designed to reduce the state's spiraling welfare costs. The law, entitled Greater Avenues for Independence (GAIN), requires recipients of Aid to Families with Dependent Children (AFDC) to participate in job search activities. If the recipients decline to participate, their benefits will ultimately be terminated.

Federal and California law recognize that certain relationships and activities deserve protection from governmental interference. The United States and California Supreme Courts have held the right of privacy is a fundamental right. An important part of the right of privacy protects parents' decisions on how to raise their children.

This Note questions the GAIN legislation's constitutionality, and asserts that GAIN infringes on the right of privacy of parents who receive AFDC benefits. This Note first examines the federal statutory authority for GAIN and some of the shortcomings of prior programs under similar legislation. It discusses the goals and mechanics of California's GAIN program, provides a synopsis of both federal and California law regarding the right of privacy within family relationships, and analyzes GAIN's impact on AFDC recipients' privacy rights.

This Note concludes that the compulsory nature of GAIN requires parents either to give up their right to choose how to raise their children, or to lose their AFDC benefits. The state's interest is not "compelling" enough to override the parents' fundamental right of privacy in child rearing matters. This Note suggests an alternative solution to controlling escalating welfare costs—a solution that does not intrude upon constitutionally protected rights.

I. Federal Statutory Authority—"WIN"

A. Background of WIN

The Work Incentive Program (WIN) was enacted as part of the

1. CAL. WELF. & INST. CODE §§ 11320-11320.9 (West Supp. 1986). Although workfare is only one component of California's program, see *infra* note 58, this type of legislation is referred to as workfare for simplification.

1967 amendments to Title IV of the Social Security Act.[2] The program required that "appropriate" AFDC recipients who were at least sixteen years old be referred by local welfare agencies to the Secretary of Labor for participation in employment or job training.[3] A recipient's refusal to participate without good cause would result in his or her removal from AFDC rolls.[4]

From the program's inception, criticism abounded.[5] Critics claimed that the work requirement for recipients created a family situation contrary to the purposes of the AFDC program.[6] AFDC funds are appropriated:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . .[7]

By taking the parents out of the home, and leaving the children alone or in day care, WIN was viewed by critics as contrary to AFDC's purposes of maintaining and strengthening family life.[8]

Additionally, welfare recipients viewed the WIN training programs cynically;[9] many recipients' experiences with past training programs revealed that the programs were "unrealistic in terms of the employment

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2. Act of Jan. 2, 1968, Pub. L. No. 90-248, Title II § 204(b), *amending* 42 U.S.C. § 602(a) (1964) (*later amended* Act of Dec. 28, 1971, Pub. L. No. 92-223 §§ 3(a)(2)-(7); Act of June 9, 1980, Pub. L. No. 96-265, Title IV, §§ 401(a)-(f); Act of Aug. 13, 1981, Pub. L. No. 97-35, Title XXIII, §§ 2313(b), (c)(1), 2314; Act of July 18, 1984, Pub. L. No. 98-369, Title VI, §§ 2631, 2634(a), 2663 (*codified as amended* at 42 U.S.C.A. §§ 602(a)(19), 630-645 (1986 Supp.)).

3. 42 U.S.C. §§ 602(a)(19)(A), 632(b) (1982). "Appropriate" recipients were those not exempt from registration as specified in 42 U.S.C. §§ 602(a)(19)(A)(i)-(viii) (1982), which includes: children under sixteen in school; elderly or ill recipients; recipients remote from a work incentive project; parents of children under six; parents in a home with another adult relative participating; and persons working more than thirty hours a week.

4. 42 U.S.C. § 602(a)(19)(F) (1982).

5. *See, e.g.*, Note, *Compulsory Work for Welfare Recipients Under the Social Security Amendments of 1967*, 4 COLUM. J.L. & SOC. PROBS. 197 (1968) [hereinafter cited as Note, *Compulsory Work*]; Comment, *Public Welfare "WIN" Program: Arm-Twisting Incentives*, 117 U. PA. L. REV. 1062 (1969) [hereinafter cited as Comment, *Public Welfare*]; Comment, *The Failure of the Work Incentive (WIN) Program*, 119 U. PA. L. REV. 485 (1971) [hereinafter cited as Comment, *Failure of WIN*].

6. *See* Comment, *Failure of WIN*, *supra* note 5, at 500.

7. 42 U.S.C. § 601 (1982).

8. *See,* Comment, *Failure of WIN*, *supra* note 5, at 500.

9. Note, *Compulsory Work*, *supra* note 5, at 201.

market and the needs and qualifications of the hard-core unemployed."[10] Critics perceived WIN's compulsory nature as another drawback, for it "retain[ed] a degrading aspect of recipiency for the poor person and preclude[d] vital case-by-case analysis and assistance."[11] A high potential for abuse existed under a compulsory system which coerced recipients to work or lose their benefits.[12] The program was believed to "intimidate and compel recipients into working or training for work, rather than luring them into the job market. This could come about both overtly through the sanctions for refusal to participate, and covertly by the myriad of regulations and the possibilities of caseworkers exercising subtle pressures upon recipients."[13] One author envisioned a result resembling the reemergence of the Elizabethan poor laws.[14]

The original WIN program did not set out the procedure for local welfare agencies to follow in referring recipients to WIN.[15] Many viewed this as an additional drawback, even though hearing requirements for other state-administered public assistance programs were apparently applicable to WIN referral hearings.[16] If WIN recipients refused to work, they were insured a hearing to determine if "good cause" existed for their refusal. However, the statute was vague as to what constituted "good cause", making it more difficult for the recipient to challenge the agency's decision.[17]

One article summarized the criticisms of the WIN program:

> Despite the early claim that WIN would provide a way for recipients to work their way off welfare by developing the skills necessary to get and hold stable, better paying jobs, it has not worked that way. Neither the WIN program nor any recent welfare reform proposal includes a job program equipped to prepare recipients for jobs in the primary labor market. Instead, the job programs intended for welfare recipients are designed to enforce the work requirement, forcing recipients into the secondary labor market rather than training them for the primary. In sum, they offer little hope of a stable, more prosperous alternative to welfare, but instead attempt to substitute the unending cycle of job search

10. *Id.*

11. *Id.* at 213.

12. *See id.* at 208-09.

13. Comment, *Public Welfare*, *supra* note 5, at 1067.

14. *Id.* The Elizabethan poor law system provided that: (1) the poor receive direct relief from funds collected by taxation; (2) poor houses be built for shelter; (3) employable poor be put to work in manufacturing projects organized by overseers of the poor; (4) the able-bodied who refused to work be sent to houses of correction; (5) poor children be put to work or apprenticed; and (6) only those settled in the community were entitled to aid. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 258-91 (1964).

15. Comment, *Public Welfare*, *supra* note 5, at 1070.

16. *Id.*

17. *Id.* at 1072-73.

and short-term, low-wage work for the relative security of a welfare check.[18]

B. The WIN Demo Program

In 1981, Congress enacted an alternative WIN program, entitled Work Incentive Demonstration Program (WIN Demo).[19] More than half of the states have applied to operate a similar discretionary program.[20] California's GAIN program was instituted under WIN Demo.[21]

WIN Demo allows a state to "be free to design a program which best addresses its individual needs, makes best use of its available resources, and recognizes its labor market conditions."[22] The state is restricted in its design only by the statement of objectives and the description of implementation techniques set forth in its program plan.[23]

Examining the states' programs under WIN Demo gives a sampling of the variations introduced. Arizona sought to expand WIN's mandatory participant group to include recipients with children aged three to five, if the recipients could arrange appropriate child care, and to eliminate the exemption for remoteness,[24] because it felt transportation was the responsibility of the recipient.[25] Virginia and Pennsylvania require applicants and recipients of assistance to participate in WIN programs.[26] Pennsylvania's plan delays an applicant's receipt of benefits until the applicant has been "exposed" to the labor market;[27] however, this requirement's legality under federal statutes has been questioned.[28]

Many state WIN Demo plans are vague and uninformative as to the exact activities participants must undergo.[29] Most states do not specify how long a participant is expected to remain in any one phase of job-seeking activity,[30] which could frustrate a recipient trapped for too long

18. Zall & Betheil, *The WIN Program: Implications for Welfare Reform and Jobs Organizing*, 13 CLEARINGHOUSE REV. 272, 281 (1979).

19. 42 U.S.C. § 645 (1982).

20. *See,* Martin-Leff, *Survey of State WIN Demonstration Applications*, 16 CLEARINGHOUSE REV. 42 (1982).

21. Greater Avenues for Independence Act of 1985, ch. 1025, § 18, 1985 Cal. Legis. Serv. 10, 157 (West); CAL. WELF. & INST. CODE §§ 11310.5, 11347-11348.4 (West Supp. 1986). *See infra* notes 36-100 and accompanying text.

22. 42 U.S.C. § 645(c) (1982).

23. *Id.*

24. An individual is not required to register for WIN if that individual is "so remote from a work incentive project that his effective participation is precluded." 42 U.S.C. § 602(a)(19)(A)(iii) (1982).

25. Martin-Leff, *supra* note 20, at 42.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* However, Virginia and Nebraska contain a relatively clear description of job search and training requirements, respectively. *Id.* at 42-43.

30. *Id.* at 43.

in one stage. For example, without any time limits, a participant could be placed in a workfare component indefinitely, which would not free the participant from welfare. Additionally, a participant could be relegated to job search activities without end, and without an evaluation of his or her progress, or the need for more training. Frustration of AFDC recipients could lead to feelings of helplessness and disgust with the system—something WIN is supposed to prevent.[31]

California's legislation was designed to address the shortcomings of other states' programs instituted under WIN Demo.[32] The legislation's authors visited programs in three Eastern states and discovered welfare recipients, placed in "dead end" jobs, who were supposedly being trained for more skilled positions.[33] For example, in a water-testing laboratory in West Virginia, the legislators met a 38 year-old woman named Velda, who had four children and whose husband was in jail. Although supposedly learning how to be a water-tester, she was receiving little training and was being used as a janitor.[34] The legislators agreed that California's program should insure this problem would not occur.[35]

II. California's WIN Demo—The Greater Avenues for Independence Act of 1985

A. Goals

California asserts that the goals of GAIN are to: (1) give a welfare recipient the opportunity to prepare for a private, unsubsidized job, resulting in his or her permanent removal from welfare rolls;[36] (2) save the state money through reduced welfare costs;[37] (3) increase state revenues

31. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families.

42 U.S.C. § 630 (1982).

32. Kirp, *How Workfare Became Law—An Amazing Compromise*, The Sacramento Bee, Oct. 13, 1985, at H1, col. 1.

33. *Id.*

34. *Id.*

35. *Id.*

36. Legislative pamphlet, *Highlights of GAIN*, at 1 (available through California Assemblyman Art Agnos) [hereinafter cited as *Highlights of GAIN*].

37. *Id. See also* CAL. WELF. & INST. CODE § 11320.2(d)(2) (West Supp. 1986). The Department of Social Services (DSS) estimates that California will save approximately $250 million a year in reduced welfare costs; yet the Legislative Analyst's office pointed out "[t]hat DSS probably exaggerated the speed with which welfare recipients will get jobs and overstated the savings from those who, in order to avoid workfare, won't sign up for welfare in the first place." Kirp, *supra* note 32. If this is so, GAIN's actual costs could be higher, and its fiscal benefits smaller, than projected. *Id.*

by creating more taxpayers;[38] (4) give welfare recipients the opportunity to participate in the decisions that affect their preparation for private employment;[39] (5) give recipients the opportunity to educate, train and prepare for a job that is not a "dead end";[40] and (6) integrate work into welfare so as to give welfare new legitimacy with the recipients and with the public.[41]

B. Mechanics of GAIN

Under the GAIN legislation, all able-bodied applicants and recipients of aid are required to register with the county welfare department.[42] A parent with primary responsibility for the care of a child under six years of age is not required to register.[43] Those persons exempt from registration may volunteer.[44] Persons who are required to register may defer participation under special circumstances.[45] Each registrant must enter into a written contract with the county social services department after being given only three days to consider and evaluate the terms of

38. *Highlights of GAIN, supra* note 36, at 1. These increased tax revenues are questionable given the low tax bracket in which most former recipients are likely to fall.

39. *Id. See also* CAL. WELF. & INST. CODE § 11320(f)(1) (West Supp. 1986). The legislative pamphlet specifically states that the recipients are expected to participate without assistance from a lawyer or welfare rights advocate (*see supra* note 36, at 1), which means AFDC recipients may not be protected from many potential abuses under the untested GAIN program.

For example, there are no provisions in the legislation for sanctions against a county for failing to meet the conditions of an assessment contract. In fact, counties are permitted to ignore the contract provisions if services are unavailable. CAL. WELF. & INST. CODE § 11320.5(d) (West Supp. 1986). There is little to prevent a county from breaching an assessment contract, especially when the contract requires the county to provide costly services to the AFDC recipient, since the county and its workers may go unpunished. It is up to the recipient to complain about a breach, and few welfare recipients will report breached contracts because they risk alienating the county workers who have the authority to cut off their AFDC benefits.

In addition, only the recipient is allowed to consider and evaluate the terms of the contract (*see infra* note 46): he or she is not allowed to take it home or show a copy to a legal representative. This aspect of the assessment contract resembles an adhesion contract. *See generally*, A. CORBIN, CONTRACTS § 559C (C. Kaufman ed. 1984 Supp.).

Moreover, if the recipient does complain about a breached contract, the grievance procedure may be formulated by the county accused of breaching the contract. CAL. WELF. & INST. CODE § 11320.65 (West Supp. 1986). Without trained legal assistance, the recipient will probably not know whether he or she received due process.

40. CAL. WELF. & INST. CODE § 11320.65 (West Supp. 1986). *See also, supra* notes 32-35 and accompanying text.

41. *Highlights of GAIN, supra* note 36. Supposedly, GAIN will put welfare on the same basis as unemployment benefits in terms of public assistance and support. *Id.*

42. CAL. WELF. & INST. CODE §§ 11320.1, 11320.5(a) (West Supp. 1986).

43. *Id.* at §§ 11320.1, 11310(b)(6).

44. *Id.*

45. *Id.* at § 11320.5(a). The statute provides:

the contract.[46] The contract must explain the program, describe the services the county will provide, outline the registrant's duties and responsiblities, and detail the consequences to a registrant for refusing to participate.[47]

Registrants who have worked in the past two years can choose between a three-week "job club"[48] or a three-week supervised job search.[49] Registrants who have not worked in the past two years must participate in a three-week job club.[50] Those registrants who lack basic literacy or mathematics skills, a high school diploma, or English language skills must be referred to appropriate education programs.[51] Those participants who are unsuccessful during job club, job search, or those who have been on and off AFDC more than twice in the past three years, are referred directly to assessment.[52]

> Unless otherwise exempt, all of the following persons shall not be required to participate in program components, beyond registration, until the county welfare department determines that the situation not requiring participation no longer exists:
>
> (1) A caretaker relative who is enrolled in school for at least 12 units of credit and has a child under age six.
>
> (2) A person who is so seriously dependent upon alcohol or drugs that work or training is precluded.
>
> (3) A person who is having an emotional or mental problem that precludes participation.
>
> (4) A person who is involved in legal difficulties, such as court-maintained appearances, which preclude participation.
>
> (5) A person who does not have the legal right to work in the United States.
>
> (6) A person who has a severe family crisis.
>
> (7) A person who is in good standing in a union which controls referrals and hiring in the occupation.
>
> (8) A person who is temporarily laid off from a job with a definite call-back date.
>
> (9) A person who is employed for 15 or more hours per week.
>
> (10) A person, or a family member, who has a medically verified illness.

Id.

46. *Id.* at § 11320.5(b).

47. *Id.* at § 11320.5(b)(1)(A)-(C).

48. A "job club" includes both job search workshops and supervised job search. Job search workshops consist of "group training sessions where participants learn various job finding skills, including training in basic job seeking skills, job development skills, job interviewing skills, understanding employer requirements and expectations, and how to enhance self-esteem, self-image, and confidence." *Id.* at § 11320.3(c)(1)(A). A supervised job search includes:

> [A]ccess to phone banks in a clean and well-lighted place, job orders, direct referrals to employers, or other organized methods of seeking work which are overseen, reviewed, and criticized by a trained employment professional. The amount and type of activity required during this supervised job search period shall be determined by the county and the participant, based on the participant's employment history and need for supportive services, and shall be consistent with regulations developed by the department.

Id. at § 11320.3(c)(1)(B).

49. *Id.* at § 11320.5(b)(3).

50. *Id.* at § 11320.5(b)(2).

51. *Id.* at § 11320.5(b)(6).

52. *Id.* at § 11320.5(c).

Assessment entails the development of an employment plan between the participant and the county welfare department.[53] The plan must include an evaluation of the participant's skills and needs.[54] Based on this assessment, training or education decisions are made. The original contract is then amended to reflect the selections and performance criteria formulated during assessment. The amended contract must also specify the supportive services to be provided to the participant—for example, child care or transportation.[55] Once training or education has begun, the participant has thirty days in which to request a change or reassignment.[56] Any participant who completes the training or education services, but remains unemployed, is referred to job search services for ninety days.[57] If the participant remains unemployed at the end of this ninety-day job search period, he or she is evaluated and reassigned to an advanced long-term preemployment preparation (PREP) assignment.[58] If

53. *Id.*

54. *Id.* This assessment must include at least all of the following:

> (1) The participant's work history, including an inventory of his or her employment skills, knowledge and abilities.
>
> (2) The participant's educational history and present educational competency level.
>
> (3) The participant's need for supportive services in order to obtain the greatest benefit from the employment and training services offered under this article.
>
> (4) The employment goals of the participant, and an evaluation of the chances for the achievement of these goals given the current potential skills of the participant and the local labor market conditions.
>
> (5) A goal to be attained upon completion of the program, including the period of time it will take to achieve this goal, and the resources available under this program for the attainment of that goal. This assessment shall be done by a person qualified by education or experience to provide counseling, guidance, assessment, or career planning. The county may contract with outside parties, including local educational agencies and service delivery areas to provide the assessment required by this subdivision.

Id. at § 11320.5(c)(1)-(5).

55. *Id.* at § 11320.5(d).

56. *Id.*

57. *Id. See supra* note 48.

58. CAL. WELF. & INST. CODE § 11320.5(d) (West Supp. 1986). *See also id.* at § 11320.3(d)(2)(B). This "preemployment preparation assignment" is the component commonly referred to as "workfare", i.e., working off the AFDC grant in public service positions. The statute reads:

> Preemployment preparation shall be work for a public or nonprofit agency that provides the participant with either of the following:
>
> (A) *Basic preemployment preparation*, which shall provide work behavior skills and a reference for future unsubsidized employment.
>
> (B) *Advanced preemployment preparation*, which shall provide on-the-job enhancement of existing participant skills in a position related to a participant's experience, training, or education acquired as a result of services funded pursuant to a contract entered into pursuant to Section 11320.5.
>
> A *short-term preemployment preparation* assignment shall be for not longer than three months, and may be provided as a preparation for other education and training services as a part of the contract amendments pursuant to subdivisions (d) and (e) of Section 11320.5. A *long-term preemployment preparation* assignment shall not exceed one year. The number of hours a person participates in a preemployment prepa-

at any time a participant does not meet the required criteria for successful completion of the assigned training or education services, the participant will be reassigned to a basic long-term PREP assignment.[59] The assignment to basic or advanced long-term PREP must be reviewed by the county at least once every six months to insure conformity to the contract and ascertain the likelihood that the program will lead to unsubsidized employment.[60] At the end of the one-year limitation on long-term PREP, the employment plan must be reviewed, and, using the procedure described for assessment,[61] the plan must be revised if necessary to obtain the goal of unsubsidized employment for the participant.[62]

Controversies concerning proposed activities are referred to arbitration, which is binding upon both the county and the participant. The arbitrator must be an impartial third party, with career planning experience and no financial or other interest in the result of the assessment.[63]

Various job services may be included in the participant's employment plan. In addition to the previously mentioned job club,[64] a participant may choose from an unsupervised job search,[65] job placement,[66] job development,[67] and employment counseling program.[68] Training and education services include job training,[69] preemployment preparation (PREP),[70] adult basic education,[71] college and community college educa-

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ration program shall be determined by adding his or her aid grant under this chapter, less any child support paid to the county, and his or her food stamp allotment and dividing by the average hourly wage for all job orders placed with the Employment Development Department. The average hourly wage shall be updated annually every July 1. No preemployment preparation assignment shall exceed 32 hours per week.

Id. at § 11320.3(d)(2) (emphasis added).

59. *Id.* at § 11320.5(d).

60. *Id.* This part of the statute specifically addresses the problems found in other states' programs. *See supra* notes 32-35 and accompanying text.

61. *See supra* note 54.

62. CAL. WELF. & INST. CODE § 11320.5(d) (West Supp. 1986).

63. *Id.* at § 11320.5(e). However, the arbitrator is chosen and paid by the county. *Id.*

64. *See supra* note 48.

65. CAL. WELF. & INST. CODE § 11320.3(c)(2) (West Supp. 1986). This activity involves the individual seeking work in his or her own way and making progress reports at least every two weeks to the county welfare department.

66. *Id.* at § 11320.3(c)(3). Job placement includes referrals to jobs listed by employers with the State Job Service.

67. *Id.* at § 11320.3(c)(4). Job development gives the participant active assistance in seeking employment by a trained employment professional on a one-to-one basis.

68. *Id.* at § 11320.3(c)(5). Counseling is "aimed at helping a person reach an informed decision on an appropriate employment goal." *Id.*

69. *Id.* at § 11320.3(d)(1). Job training includes "training in employer-specific job skills in a classroom or onsite setting, including training provided by local private industry council programs and community colleges." *Id.*

70. *Id.* at § 11320.3(d)(2). *See supra* note 58.

71. CAL. WELF. & INST. CODE § 11320.3(d)(3)(West Supp. 1986). Adult basic education includes "reading, writing, and arithmetic necessary for employment or job training, including high school proficiency." *Id.*

tion,[72] vocational instruction in English as a second language,[73] grant diversion,[74] supported work, and transitional employment.[75] Priority in receiving services which are either expensive, lengthy, or both is given to persons who have received aid for at least two years or who have little or no employment history.[76] Less costly services and short-term services are provided to recipients of aid for less than two years, unless it is determined that these types of services would not be effective in helping the recipient obtain unsubsidized employment.[77] If services to be provided under the contract are not immediately available to the participant, he or she is required to participate in job search activities until such services become available.[78]

GAIN's authors attempted to prevent the displacement of the current workforce by restricting the types of positions the employment and training program participants and PREP assignees may fill.[79] These programs may not (1) displace current employees or undercut any overtime currently worked; (2) fill "established unfilled positions";[80] (3) fill positions which would otherwise be promotional opportunities for current employees; (4) fill positions prior to compliance with applicable personnel procedures or collective bargaining provisions; (5) fill positions created by termination, layoff, or reduction in workforce; or (6) create positions as a result of strike, lockout, or other bona fide labor dispute or

72. *Id.* at § 11320.3(d)(4). College education is only provided when it "provides sufficient employment skills training that can reasonably be expected to lead to employment." *Id.* A person already enrolled in a vocational training or educational program may continue to participate for a maximum of only two academic years. *Id.* at § 11320.5(b)(5).

73. *Id.* at § 11320.3(d)(5). This is intensive English instruction for non-English speaking participants, coordinated with specific job training. *Id.*

74. *Id.* at § 11320.3(d)(6). Grant diversion means "public or private sector employment or on-the-job training at comparable wage rates, in which the recipient's cash grant, or a portion thereof, or the welfare grant savings from employment, is diverted to the employer as a wage subsidy." *Id.* at § 11320.3(d)(8).

75. *Id.* at § 11320.3(d)(7)-(8). Supported work and transitional employment mean "a form of grant diversion in which the recipient's cash grant, or a portion thereof, or the welfare grant savings from employment, is diverted to an intermediary service provider." *Id.*

Under grant diversion, supported work, and transitional employment projects, a recipient must not receive less income than if he or she had not participated in the project. All employers receiving county funds must agree not to discriminate against participants in race, sex, national origin, age, or disability. *Id.*

76. *Id.* at § 11320.4(b).

77. *Id.* at § 11320.4(c).

78. *Id.* at § 11320.5(d). For a discussion of the possible implications of this provision, see *supra* note 39.

79. CAL. WELF. & INST. CODE §§ 11320.35, 11320.38 (West Supp. 1986).

80. "Established unfilled positions" are those positions that have already been created and occupied, but are temporarily vacant due to the employee leaving, retiring, dying, or being fired. However, the positions may be filled if they are unfunded in a public agency budget. This exception is only applicable to PREP positions. *Id.* at § 11320.35(b).

violation of any existing collective bargaining agreement.[81]

These broad restrictions, designed to protect the current workforce, could effectively shut out GAIN participants from meaningful employment. The legislature did not include any provisions in GAIN to create new jobs, and the primary labor market will not necessarily expand to accomodate GAIN participants.

C. Sanctions for Non-Participation

Sanctions are imposed if recipients fail or refuse to participate in an assigned component without good cause.[82] Yet they may not be imposed before informal and formal efforts at resolution and a good cause determination are undertaken.[83] The statute provides grounds which constitute "good cause", including: employment or training which is not within the scope of the contractual employment plan,[84] requires a travel period in excess of two hours round trip,[85] or involves conditions violating health and safety standards;[86] a breakdown in transportation arrangements;[87] failure to receive supportive services agreed to under the contract;[88] or employment at a wage level that results in a net loss of income to the recipient.[89]

Once formal conciliation efforts have failed, those recipients who fail or refuse to comply are placed on money management (*i.e.*, vendor and third party payments) by the County Welfare Department for three months.[90] Aid is reinstated and money management discontinued if recipients agree to participate in the GAIN program during the three-month sanction period.[91] If a person still refuses to participate after the three-month money management period, or it is the second time the person has failed to cooperate, aid is reduced or terminated for three or six months.[92]

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81. *Id.* at § 11320.35, 11320.38.

82. *Id.* at § 11320.6(a).

83. *Id.* The County Welfare Department must develop regulations specifying the maximum length of time allowed for informal conciliation efforts. *Id.* Formal conciliation efforts are to be conducted in accordance with § 5302 of the California Unemployment Insurance Code, or a procedure established by the county pursuant to § 11320.2 of the California Welfare and Institutions Code. *Id.* at § 11320.65.

84. *Id.* at § 11320.7(a)(8).

85. *Id.* at § 11320.7(a)(3).

86. *Id.* at § 11320.7(a)(5).

87. *Id.* at § 11320.7(f).

88. *Id.* at § 11320.7(a)(11).

89. *Id.* at § 11320.7(a)(13). Numerous other grounds are also enumerated in the statute. *Id.* at § 11320.7(a)(1)-(13), (b)(l).

90. *Id.* at § 11320.6(b). Vendor and third party payments are payments, for items of support to the child, made directly to vendors by the County Welfare Department. *Id.* at § 11454.

91. *Id.* at § 11320.6(b).

92. *Id.* at § 11320.6(b)(1)-(3). If the individual who refuses to participate is a caretaker relative receiving aid, then the family's assistance is reduced by the amount allocated to that

Counties are required to establish formal grievance procedures,[93] which participants may invoke any time they believe a program requirement or assignment violates their contract or is inconsistent with the GAIN Act.[94] Participants dissatisfied with the outcome of the grievance procedure may appeal the decision.[95] Sanctions are not imposed during the grievance procedure as long as the recipient continues to participate in the program pending the outcome of the process.[96] By requiring AFDC recipients to maintain participation in GAIN while invoking the grievance procedures, counties may unnecessarily cause a difficult situation for participants with good cause not to continue. Some grounds for failing to participate make it impossible for the recipient to continue participation pending the outcome of the grievance procedure.[97]

Gain is a compulsory program because sanctions are imposed for non-compliance. As a result of this compulsory aspect, certain constitutional issues are raised. All GAIN participants are parents of minor children, and therefore day care is required to take care of participants' younger children while the parents are meeting GAIN's requirements.[98] Older children are left alone while their parents are out. The day care issue raises constitutional questions concerning parents' right of privacy in raising their children.

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caretaker relative. If the parent who is the principal wage earner makes the refusal, assistance to the family is terminated.

These sanctions are incurred for three months if it is the first occurrence. For each subsequent occurrence, the sanctions are assessed for six months. *Id.* at § 11305(a)-(b).

93. *Id.* at § 11320.65.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See generally, supra* notes 84-89 and accompanying text. For example, a recipient has good cause for refusing to continue if the employment or training involves conditions violating health and safety standards. See *supra* note 86 and accompanying text. Requiring a recipient to continue participating in this situation pending the outcome of a grievance procedure could endanger his or her life or health. Also, a recipient has good cause for refusing to continue if supportive services under the contract are not provided. *See supra* note 88 and accompanying text. A recipient who fails to receive child care services would have to choose between leaving the child alone or losing the benefits by failing to participate in GAIN pending the outcome of the grievance procedure. A recipient whose transportation arrangements break down also has good cause not to participate. *See supra* note 87 and accompanying text. However, the requirement to continue participating during the grievance procedure runs counter to the impossibility of doing so when there is no transportation.

98. The California Legislature passed the GAIN Legislation as part of a compromise which included a bill authorizing a $22.5 million expenditure for extended day care services to GAIN participants' school age children. CAL. EDUC. CODE §§ 8460-8492 (West Supp. 1986). The bill also included day care funding for low income, non-GAIN participants. *Id.* at § 8468.5(b)(1)(B). The bill's authors estimated that between 50,000 to 90,000 additional children will require day care because of the GAIN requirements. Legislative Pamphlet, *Overview of SB 303*, at 3 (available through California Senator David Roberti) [hereinafter cited as *Overview of SB 303*].

III. Privacy Within Family Relationships

A. Federal Law

Since the early years of this century, the United States Supreme Court has recognized that certain family relationships deserve protection against unwarranted intrusion by the state. The freedom to rear one's children is one such highly protected right. Two early cases, based on the Fourteenth Amendment's protection of liberty through the Due Process Clause,[99] laid the foundation for the right of parents to direct their childrens upbringing.

In *Meyer v. Nebraska*,[100] a parochial school teacher was convicted of violating a Nebraska statute which forbade the teaching of school children in any non-English language. The law was invalidated by the Supreme Court as an invasion of the liberty guaranteed by the Fourteenth Amendment.[101] In reaching its decision, the Court expanded its view of individual liberty to encompass not only the right to be free from physical confinement, but also the right to establish a home and bring up children.[102]

In *Pierce v. Society of Sisters*,[103] an Oregon law requiring mandatory public school attendance was challenged by the Society of Sisters, an Oregon corporation, organized to educate and care for orphans according to the tenets of the Roman Catholic Church.[104] The Oregon statute required that children be sent to public schools, thus outlawing any instruction by private organizations. The Court ruled that such a statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[105]

These decisions were based on the doctrine of "substantive due process." This doctrine grew out of the concept that a higher or natural law limits the government's ability to restrain individual liberty. The Supreme Court has on occasion suggested that under substantive due process analysis, it has an inherent right to review the substance of state or federal legislation.[106] The substantive due process doctrine was widely accepted until 1937,[107] when the Supreme Court shifted its focus from a substantive due process, to an equal protection analysis, in its evaluation

99. The Due Process Clause provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .". U.S. CONST. amend. XIV, § 1.

100. 262 U.S. 390 (1923).

101. *Id.* at 399-400.

102. *Id.* at 399.

103. 268 U.S. 510 (1925).

104. *Id.* at 531-32.

105. *Id.* at 534-35.

106. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 331-32 (3d ed. 1986) [hereinafter cited as NOWAK].

107. *Id.* at 342-43.

of governmental regulation and fundamental rights cases. However, one area where both substantive due process and equal protection analysis have been applied, is the "right of privacy."[108] *Meyer* and *Pierce* were important to the growth of a constitutional right of privacy, and both cases show a historical recognition that inherent in the concept of liberty is the right to private decision-making regarding family matters.[109]

More recently, the Court has chosen to protect fundamental rights such as child rearing through its interpretation of the Constitution's guarantee of a right of privacy.[110] The right of privacy was first discussed in *Griswold v. Connecticut*,[111] which overturned a state law proscribing the use of contraceptives. The appellants in *Griswold*, a doctor and a Planned Parenthood League executive, had been convicted for giving information and medical advice to married persons concerning contraception, and for prescribing a contraceptive device.[112] The Court held that the law impermissibly limited the right of privacy of married persons, and violated the Due Process Clause by depriving married persons of the liberty protected by the fundamental right of privacy.[113] Justice Douglas, in the majority opinion, attempted to relate the right of privacy to constitutional guarantees, since the Court continued to formally reject the substantive due process decisions of the early part of the century.[114] The Court found that the right of privacy emanates from several guarantees of the Bill of Rights, but that the right is not based on a specific constitutional provision:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one [such zone of privacy] . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the

108. *Id.* at 351.

109. *Id.* at 685.

110. *See, e.g.*, Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

111. 381 U.S. 479 (1965).

112. *Id.* at 480.

113. *Id.* at 481-86.

114. NOWAK, *supra* note 108, at 686.

people."[115]

Based on Justice Douglas' analysis, the right of privacy was created in *Griswold*.

The *Griswold* Court cited *Meyer* and *Pierce* to show that the zones of privacy encompassed the fundamental right of parents in rearing their children.[116] The individual's right to freedom of choice in marriage and family relationship lies at the heart of the right of privacy.[117]

In his concurrence in *Griswold*, Justice Goldberg more clearly described the rule of law surrounding the zones of privacy. He stated that the Court has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights specifically mentioned by name in the Constitution.[118] He also outlined the state's burden in justifying an intrusion in a protected area. Fundamental personal liberties may not be abridged by states simply upon a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose:[119] "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[120] The law must be shown to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[121] Legislation impinging on constitutionally protected areas also must be narrowly drawn and not of an "unlimited and indiscriminate sweep."[122]

In *Roe v. Wade*,[123] the zone of privacy announced in *Griswold* was further particularized as created within the penumbras of the Bill of Rights, the Ninth Amendment, and the concept of liberty in the Fourteenth Amendment.[124] In overturning a state law prohibiting abortion, the Court stated that only personal rights that are deemed "fundamental" are included in the guarantee of personal privacy.[125] This privacy

115. 381 U.S. at 484.

116. *Id.* at 482.

117. NOWAK, *supra* note 108, at 689. *See also*, Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986).

118. 381 U.S. 479, 486 n.1 (1965).

119. *Id.* at 497.

120. *Id.* (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)). *Bates* involved city ordinances which required the NAACP to supply city officials with the names of its members. The Court held that disclosure would interfere with the members' freedom of association, which is protected by the Due Process Clause of the Fourteenth Amendment.

121. *Id.* (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)). In *McLaughlin*, the Court overturned a Florida statute which prohibited an unmarried interracial couple from habitually living in and occupying the same room at night. As no other statute prohibited the same conduct by members of the same race, the Court held the statute violated the Equal Protection Clause of the Fourteenth Amendment.

122. Shelton v. Tucker, 364 U.S. 479, 490 (1960).

123. 410 U.S. 113 (1973).

124. *Id.* at 152.

125. *Id. See also*, Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986).

right was found to encompass "child rearing."[126] In his concurrence in *Roe v. Wade*, Justice Stewart announced that *Griswold* was previously decided under the doctrine of substantive due process, and that this underlies the right of privacy.[127]

In *Carey v. Population Services International*,[128] the Court cited *Roe v. Wade* in striking down a state law prohibiting the sale of non-prescription contraceptives to minors. The Court stated that "[a]lthough '[t]he Constitution does not explicitly mention any right of privacy,' . . . one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' "[129]

Recently, in *Bowers v. Hardwick*,[130] the Supreme Court held that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. The Court distinguished the established line of right of privacy cases, stating that there is no connection between privacy within family relations, marriage, and procreation, and privacy of homosexual activity. Thus, while declining to extend the right of privacy, the Court nonetheless reaffirmed the right in the area of traditional family relations.[131]

The privacy right is not absolute. At some point the state's interest becomes so compelling as to justify regulation by the state.[132] But where certain fundamental rights are involved, the Court has applied the "strict scrutiny" test: regulations limiting these rights must be narrowly drawn,[133] and may be justified only by a "compelling state interest."[134]

B. California Law

In California, the right of privacy is not inferred from "penumbras" or "zones," but is explicitly guaranteed by Article I, § 1 of the California Constitution: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[135]

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126. 410 U.S. at 153.

127. *Id.* at 167.

128. 431 U.S. 678 (1977).

129. *Id.* at 684.

130. 106 S. Ct. 2841 (1986).

131. *Id.* at 2843-44.

132. *Roe*, 410 U.S. at 154.

133. *See supra* note 120.

134. *Roe*, 410 U.S. at 155 (citing Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

135. CAL. CONST. Art. I, § 1 (West Supp. 1986).

Child rearing is also a fundamental right under California law, and the California courts have followed the federal law regarding the scope of the privacy right. In *In re Marriage of Wellman*,[136] the California Court of Appeals emphasized "that the custody, care and nurture of the child reside first in the parents . . . ."[137] In that case, the trial court, in a dissolution proceeding, ordered a wife to have no overnight visits in her children's presence with a man to whom she was not married.[138] The appellate court held that this order intruded on the mother's right of privacy and right to freely associate with others.[139] The court stated: "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[140] In *Crain v. Krehbiel*,[141] a federal court, interpreting California law, held that state constitutional protection of individual autonomy is generally limited to matters relating to, among other things, marriage and child rearing.[142]

In *Perez v. City of San Bruno*,[143] the California Supreme Court stated the test to determine whether a law unconstitutionally restricts a fundamental right, such as child rearing: "When rights of such fundamental nature are involved, 'regulation limiting these rights may be justified only by a "compelling state interest," . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.' "[144] This is the same test used by the United States Supreme Court.[145]

C. Welfare and the Right of Privacy

Under federal law, the receipt of welfare benefits is not a fundamental right.[146] However, the protection of constitutional rights may not be made to turn upon whether a governmental benefit is a "right" or a

136. 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980).

137. *Id.* at 996, 164 Cal. Rptr. at 150.

138. *Id.* at 994, 164 Cal. Rptr. at 149.

139. *Id.* at 999, 164 Cal. Rptr. at 153.

140. *Id.* at 996, 164 Cal. Rptr. at 150 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)). *See also,* People v. Thomas, 159 Cal. App. 3d Supp. 18, 206 Cal. Rptr. 84 (Cal. App. Dept. Super. Ct. 1984) (statute requiring child seat restraints does not infringe on parent's fundamental right of privacy).

141. 443 F. Supp. 202 (N.D. Cal. 1978).

142. *Id.* at 208.

143. 27 Cal. 3d 875, 616 P.2d 1287, 168 Cal. Rptr. 114 (1980).

144. *Id.* at 890 n.11, 616 P.2d at 1995 n.11, 168 Cal. Rptr. at 122 n.11 (quoting Roe v. Wade, 410 U.S. at 155).

145. *See supra* notes 110-130 and accompanying text.

146. Krislov, *The OEO Lawyers Fail to Constitutionalize Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 8 MINN. L. REV. 211, 228-29 (1973), *citing* Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge*, the Court stated:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth

"privilege."[147] "Unconstitutional conditions cannot be attached to the receipt of benefits in such a way that the recipient of the benefit is forced to choose between the benefit and relinquishment of a constitutional right."[148] Therefore, welfare recipients do not waive their right to seek redress of a violation of their constitutional rights, merely because their receipt of aid is based on government "largesse."[149]

Welfare recipients' rights to privacy were upheld by the California Supreme Court in *Parrish v. Civil Service Commission*,[150] which held that unannounced dawn searches of county welfare recipients' homes was an unconstitutional deprivation of privacy.[151]

Since welfare recipients do not forfeit their constitutional rights in return for benefits, they may challenge the GAIN legislation if it infringes on their right of privacy.

IV. GAIN's Impact on Privacy Rights

By definition, AFDC recipients are parents of minor children.[152] Under the GAIN legislation, AFDC recipients are required to participate in job search and job training activities outside of the home or risk losing their benefits.[153] While seeking employment or job training, parents are compelled to place their children aged six to eleven in child care, and older children are often left alone at home.[154] In two-parent families on AFDC, only one parent is required to seek work.[155] By requiring only one parent to seek employment and by allowing the other parent to remain in the home with a child under six, the state has thus recognized

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Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. . . .

To be sure, the cases cited [requiring only the "reasonable basis" test of Due Process], and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.

Id. at 484-85.

147. Rafaelli v. Comm. of Bar Examiners, 7 Cal. 3d 288, 300, 496 P.2d 1264, 1272, 101 Cal. Rptr. 896, 904 (1972) (citing Graham v. Richardson, 403 U.S. 365, 374 (1972)).

148. Note, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME LAW. 603, 617 (1969) (citing Speiser v. Randall, 357 U.S. 513, 518 (1958), and Sherbert v. Verner, 374 U.S. 398, 405 (1963)) [hereinafter cited as Note, *Social Welfare*]. *See also*, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599-1602 (1960).

149. Note, *Social Welfare, supra* note 144, at 609.

150. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

151. *Id.* at 263, 425 P.2d at 225, 57 Cal. Rptr. at 625. *See also*, Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

152. CAL. WELF. & INST. CODE § 11250 (West Supp. 1986); 42 U.S.C. § 601 (1982).

153. CAL. WELF. & INST. CODE § 11320-1320.9 (West Supp. 1986).

154. *Id.* at § 11320.3(e)(1).

155. *Id.* at § 11310(b)(7).

the importance of the parental presence in the home to both parent *and* child.

Parents with children aged six to eleven may not want to place their children in day care; they may have a legitimate concern for the effect day care may have upon their children's development.[156] Parents may additionally fear that their children will be abused in child care centers. Such fears are not unwarranted: the public's concern with sexual abuse in day care centers has led to calls for legislation in California,[157] as well as widespread distrust of day care centers.[158]

Under the GAIN regulations, parents must place their children in child care facilities whose fees fall within the "regional market rate," which is defined as "costing no more than 1.5 market standard deviations above the mean cost of care for that region."[159] Parents are therefore limited in their choice of child care providers. The parents must utilize the best care the *state* offers instead of the best care the parent chooses which, in many cases, would be the parent rather than the day care center.

Older children left unattended while their parents are at work might also cause parents concern for their children's well-being. Children left alone at home after school are frequently referred to as "latchkey kids."[160] Parents have reason for concern about the loneliness, boredom, and safety risks their children may face.[161] A recent study reported that

156. *See* Belsky & Steinberg, *Effects of Day Care*, ANN. PROGRESS IN CHILD PSYCH. & CHILD DEV., 576 (1979):

> To an overwhelming degree, research on day care has been conducted in university-based or university-connected centers with high staff-child ratios and well-designed programs directed at fostering cognitive, emotional, and social development. Yet, most of the day care available to the nation's parents is certainly not of this type and may not be of this quality . . . . [I]n the only study to date assessing the quality of day care (Keyserling 1972), the majority of non-profit and, especially, of proprietary centers were judged inferior.

Id. at 578-79; *see also*, Etaugh, *Effects of Maternal Employment on Children*, 10 FAMILY THERAPY COLLECTIONS 16 (1984); Cherry & Eaton, *Physical and Cognitive Development in Children of Low Income Mothers Working in Child's Early Years*, 48 CHILD DEV. 158 (1977); Dunlop, *Maternal Employment & Child Care*, 12 PROF. PSYCHOLOGY 67 (1981); Meredith, *The Nine-to-Five Dilemma*, PSYCHOLOGY TODAY, Feb. 1986, at 36.

157. California Child Day Care Facilities Act, CAL. HEALTH & SAFETY CODE § 1596.70-1596.893 (West Supp. 1986). Two of the main purposes of this legislation are to increase the efficiency and effectiveness of child care licensing, and to enhance consumer awareness. *Id.* at § 1596.736.

158. *See, e.g.*, Watson, *A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30; Beck, *An Epidemic of Child Abuse*, NEWSWEEK, August 20, 1984, at 44; *"Brutalized"—Sex Charges at a Nursery*, TIME, April 2, 1984, at 21; Elshtain, *Invasion of the Child Savers*, PROGRESSIVE, Sept. 1985, at 23.

159. CAL. WELF. & INST. CODE § 11320.3(f) (West Supp. 1986).

160. L. LONG & T. LONG, THE HANDBOOK FOR LATCHKEY CHILDREN AND THEIR PARENTS 17 (1983). *See also Overview of SB 303*, *supra* note 98, at 1.

161. *See, e.g., Helping Latchkey Children*, CHILDREN TODAY, Sept.- Oct. 1985, at 2 ("Unattended children need to learn to act responsibly to emergencies and other important life

these children are also more likely to experiment with sex than are other children their age.[162] Teenage pregnancy, while dangerous for society as a whole, is especially hazardous to children of welfare recipients. The children may feel even more trapped within the circle of poverty if they believe that once they become pregnant, their only option will be to drop out of school and go on welfare.

In addition to these concerns about the negative effects on day care children and of children left home alone, parents may also have a legitimate interest in spending time with their children, supervising their activities, and participating in their development. This participation, which helps strengthen family bonds, is jeopardized by GAIN's compulsory requirements.[163]

All of these concerns demonstrate that the GAIN legislation denies parents important choices in raising their children. GAIN interferes with the parents' rights by forcing them to place younger children in day care, and leave older children unattended, with all of the resulting problems. GAIN's compulsory nature infringes on the parents' fundamental right to control and guide their children's upbringing, as established under both federal and state law.[164] A voluntary program would preserve the parents' control over their children's upbringing.

V. Fundamental Right Versus Compelling State Interest

California's primary goal behind the GAIN legislation is to permanently remove present recipients from welfare rolls and to save money for the state through reduced welfare costs.[165] Thus, the state's interest is primarily in economic savings. The other goals California asserts[166] are considered part of the state's primary goal of economic savings, since in actuality, they result from the Legislature's desire to save the taxpayers' money, and do not comprise separate state interests. Since the fundamental right of privacy is involved, regulations limiting this right must be narrowly drawn and may only be justified by a "compelling state

situations."); Galambos & Garbarino, *Identifying the Missing Links in the Study of Latchkey Children*, CHILDREN TODAY, July-Aug. 1983, at 2; Guerney & Moore, *Phone-Friend: A Prevention-Oriented Service for Latchkey Children*, CHILDREN TODAY, July-Aug. 1983, at 5; Scherer, *The Loneliness of the Latchkey Child*, INSTRUCTOR, May 1982 at 38; Campbell & Flake, *Latchkey Children—What is the Answer?*, CLEARINGHOUSE, May 1985, at 381; Wellborn, *When School Kids Come Home to An Empty House*, U.S. NEW & WORLD REPORT, Sept. 14, 1981, at 42.

162. *Latchkey Kids Likely to Try Sex, Study Says*, San Francisco Chron., Nov. 25, 1985, at 61, col. 3.

163. It is true that parents and children who are not receiving AFDC may face similar problems. However, because of different financial conditions, families not receiving AFDC benefits may have more options available to them than do AFDC families.

164. *See supra* notes 101-141 and accompanying text.

165. *See supra* note 37.

166. *See supra* notes 36, 39-41 and accompanying text.

interest."[167]

In *Darces v. Wood*,[168] the California Supreme Court addressed the issue of fiscal integrity as a compelling interest. *Darces* involved the state's refusal to take the needs of undocumented alien children into account in determining AFDC benefits.[169] The state argued that fiscal concerns prevented it from providing benefits to undocumented alien children.[170] The court ruled, however, that the "[p]reservation of the fisc is an insufficient justification" under heightened scrutiny,[171] and therefore fiscal concerns will not outweigh a fundamental constitutional right.

In reaching its decision, the California Supreme Court relied upon the United States Supreme Court's holding in *Plyer v. Doe*.[172] In that case, Texas sought to withhold from school districts any state funds for the education of children who were not "legally admitted" into the United States.[173] The *Plyer* Court held that "the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[174] Therefore, California's overriding interest in reducing welfare costs through the GAIN program is not compelling enough to overcome its infringement of the parent's constitutional right of privacy.

Additionally, the GAIN statute itself is not narrowly tailored to achieve the state's goals without violating AFDC recipients' right of privacy, because it requires compulsory, rather than voluntary, participation by those persons not exempt.[175] If the program were made voluntary, the state's interest in economic savings could still be achieved,[176] yet the participant's constitutional rights would remain unaffected because it would allow parents to choose their method of child rearing. Also, early workfare commentators stated that compulsory programs did not achieve their stated goals.[177] Thus, it is the compulsory nature of GAIN that violates the constitutionally protected right of privacy.

In addition to the constitutional problems raised by GAIN, certain negative components of the original WIN program are also present in the California plan.[178] Since parents are forced to work outside the home,

167. *See supra* notes 139-141 and accompanying text.

168. 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984).

169. *Id.* at 875, 679 P. 2d at 460, 201 Cal. Rptr. at 809.

170. *Id.* at 894, 679 P.2d at 473, 201 Cal. Rptr. at 822.

171. *Id.*

172. 457 U.S. 202 (1982).

173. *Id.* at 205.

174. *Id.* at 227 (citing Graham v. Richardson, 403 U.S. 365, 374-75 (1971)).

175. *See supra* note 50-52 and accompanying text.

176. Massachusetts' WIN Demo program was voluntary, and saved the state approximately $50 million over a two-year period. Kirp, *supra* note 32.

177. Note, *Compulsory Work*, *supra* note 5, at 213.

178. *See supra* notes 5-14 and accompanying text.

and children are often left alone or in daycare centers, some families may be affected in a way contrary to the stated purposes of the AFDC program.[179] Also, a compulsory program forces people into the labor market by intimidation, rather than of their own accord.[180]

The authors of GAIN conscientiously attempted to address the shortcomings of other states' WIN Demo programs.[181] However, California's program could be made constitutional, and otherwise further strengthened, if it were voluntary. If GAIN was made voluntary, there would be no infringement on participants' right of privacy, since parents would be able to choose to stay at home, place their children in day care centers, or leave their children at home. Additionally, the degrading aspects that compulsion implies would not be present: recipients would be able to take pride in their accomplishments and acquire skills which would allow them to be responsible and independent members of society, free from the dictates of the state.

Conclusion

California's new "workfare" legislation, GAIN, infringes upon AFDC recipients' right of privacy to choose how to rear their children. The right of privacy is a fundamental right that protects individuals from unwarranted governmental intrusion without a compelling state interest. The GAIN legislation intrudes upon the recipients' right of privacy by making participation compulsory. This forces parents to place children in day care or leave them home alone, and thus deprives parents of the fundamental right to choose how to rear their children. The state's interest in this legislation is in economic savings, which does not constitute a compelling interest justifying the infringement. No compelling state interest exists to justify this infringement. The legislation is unconstitutional because it invades the liberty guaranteed by the Fourteenth Amendment and the right of privacy under federal and state constitutions.

The authors of the GAIN legislation acknowledge that recipients of aid "desire to work, and will do so if provided with the opportunity."[182] Compulsory programs are not successful at helping participants achieve freedom from welfare.[183] Making California's program voluntary would not only avoid denying AFDC recipients their constitutional rights, but would conclusively establish what the California legislators are asserting:

179. *See supra* notes 7-8 and accompanying text.

180. *See supra* notes 11-14 and accompanying text.

181. *See supra* notes 32-35 and accompanying text.

182. CAL. WELF. & INST. CODE § 11320(a) (West Supp. 1986).

183. Note, *Compulsory Work*, *supra* note 172.

that given the training, preparation, and necessary support services, most welfare recipients would choose work over welfare.

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